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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1199

EARL S. JENNINGS,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Earl S. Jennings, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the trial court, United States District Court for the District of Columbia, is reported at 235 F. Supp. 551 (D.D.C. 1964), (Appendix B). The United States Court of Appeals for the District of Columbia Circuit entered their judgment affirming the lower court without opinion on March 9, 1966 (Appendix C).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 9, 1965. The jurisdiction of the Court is invoked under 28 U.S. Code 1254(1)

QUESTION PRESENTED

Whether the issuance of the search warrant authorizing the search of the premises at 301 56th Street, N. E., Apartment 31, Washington, D. C., was supported by a sufficient affidavit to justify the United States Commissioner's finding of probable cause.

STATEMENT

On January 17, 1964, upon the affidavit of Detective David Paul of the Metropolitan Police Department's Narcotics Squad, the United States Commissioner for the District of Columbia issued a search warrant for the premises 301 56th Street, N. E., Apartment 31, Washington, D. C. Petitioner was found seated on a bed in the rear of the apartment. Narcotics were located in the apartment after questioning the petitioner. Detectives Didone and Paul testified at petitioner's trial that the petitioner showed them where the narcotics were hidden in the apartment and stated to them that the narcotics belonged to him. Petitioner was not the owner or lessee of the apartment in question. Petitioner was taken into custody and subsequently indicted. He was convicted of two counts in the indictment charging violations of 26 U.S.C. 4704 (a) and 21 U.S.C. 174, respectively. The indictment originally contained four counts, the last two of which were dismissed on petitioner's motion for judgment of acquittal on the ground that the indictment enlarged one transaction into two. Petitioner was sentenced on Count One of the indictment to a term of two-to-seven years and on Count Two to a term of two-to-seven years. Sentences are to run concurrently. Petitioner filed a timely notice

of appeal in the United States Court of Appeals for the District of Columbia Circuit which subsequently affirmed the conviction on March 9, 1966, by a judgment without opinion.

REASONS FOR GRANTING THE WRIT

It is submitted that both the lower court and the Court of Appeals applied an erroneous test for testing the sufficiency of an affidavit before a United States Commissioner in support of a request for a search warrant. Further, the affidavit (Appendix A) was insufficient in any event as it reduced any finding of probable cause by the Commissioner to one of pure speculation and guesswork.

The affidavit contained no information of any kind that narcotics were or ever had been on the premises for which the search warrant was issued. The relevant facts set forth in the affidavit were as follows: a detective received information from a previously reliable source that two individuals (neither of whom were petitioner) were selling narcotics on a street corner in the northwest section of Washington. The source had purchased heroin from these individuals. This same source related that the two individuals obtained new supplies of heroin often several times a day.

A second source described in the affidavit as previously reliable stated to detectives that he had been purchasing heroin from these same two individuals at the same location. He further related that these two individuals were making several trips a day to northeast Washington and that when they returned they would have fresh supplies of heroin. Nothing is contained in the affidavit as to how this source knew the two individuals went to northeast Washington or where in northeast they went.

On January 17, 1964, Narcotics Squad detectives observed the two individuals leave the vicinity of the street corner in northwest Washington where they had alleged-

ly been selling heroin. They left in an automobile and the detectives followed them. The vehicle went to the vicinity of 56th Street, N. E.; then the detectives observed the two individuals walk to and enter premises known as 301 56th Street, N. E. This was a three-story apartment house. No information is contained in the affidavit as to where the individuals went in the apartment house and what they did. A short time later they left the apartment house, and drove back to the northwest street corner. At this time they were taken into custody and found to be in possession of narcotics. One of the individuals revealed to the detectives that they had just obtained their supply of heroin in northeast Washington but would not reveal the location. Subsequent investigation revealed that one of the individuals had 301 56th Street, N. E., Apartment 31 as his address. It is on the basis of these facts that the United States Commissioner made a finding of probable cause to issue a search warrant for narcotics at apartment 31.

When executing the search warrant, the detectives found petitioner in the apartment and also narcotics.

The District Court in its opinion, *United States v. Jennings*, 235 F. Supp. 551 (D.D.C. 1964), states "the test to be applied is whether there was a substantial basis for the Commissioner to conclude that narcotics were in the premises authorized to be searched." In support of this proposition the Court cited *Rugendorf v. United States*, 376 U.S. 528, 533 (1964); and *Jones v. United States*, 362 U.S. 257, 271 (1960). It is submitted that the test set forth by the lower court is clearly erroneous and resulted from a misinterpretation of the cases relied on. A reading of both cases, *Jones* and *Rugendorf*, and *Aquilar v. Texas*, 378 U.S. 108 (1964), in relation to the phrase "substantial basis" indicates that the use of the phrase refers to the proposition that there must be a substantial basis to credit any hearsay upon which any affidavit in support of a search warrant relies. It is not accurate to say that a Commissioner may issue a search warrant if he finds a

substantial basis to conclude that narcotics were in the premises to be searched.

Probable cause must be something more than speculation or guesswork. Here the affidavit and resulting finding of probable cause can be nothing more than a guess by the Commissioner.

All the cases relied on by the District Court and the Court of Appeals contained factual settings wherein there had been direct observation of the premises concerned and direct observation of illegal activity.

Irby v. United States, 114 U.S. App. D.C. 246, 314 F.2d 251, cert. denied, 374 U.S. 842 (1963)

Jones v. United States, 362 U.S. 257 (1960)

Rugendorf v. United States, 376 U.S. 528 (1963)

United States v. Ventresca, 380 U.S. 102 (1965)

Ward v. United States, 108 U.S. App. D.C. 282, 281 F.2d 917 (1960)

CONCLUSION

To clarify the term "substantial basis" and set forth exactly its application and to correct a manifest error of a finding of probable cause for the issuance of a search warrant, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas R. Dyson, Jr.
500 Hill Building
Washington, D. C. 20006
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition was hand delivered on the 8th day of April, 1966, to the U.S. Attorney's Office, U. S. District Courthouse Building, 3rd and Constitution Avenue, N. W., Washington, D. C.

Thomas R. Dyson, Jr.

APPENDIX A

Narcotic Squad, M.P.D.C.
January 17, 1964

AFFIDAVIT IN SUPPORT OF AN APPLICATION FOR U.S. COMMISSIONER'S SEARCH WARRANT FOR PREMISES 301 56th STREET, N.E., APARTMENT 31, WASHINGTON, D.C., OCCUPIED BY ESTHER McNAIR, ALIAS ESTHER NELSON AND JOSEPH H. NELSON.

Prior to January 17, 1964, Detective David Paul, Narcotic Squad, M.P.D.C., received information from a previously reliable source that Esther McNair and Joseph Nelson were engaged in the illicit narcotic traffic and that they were selling heroin in the vicinity of 8th & L Streets, N.W. This source relates that it had purchased heroin from both McNair and from Nelson and that it was similar to other heroin that the source had used. This source also related that the last purchase of hereoin it made from McNair and Nelson was on January 16, 1964. This same source also related that both subjects, McNair and Nelson, obtain new supplies of heroin often several times a day. Detective Thomas Didone, Narcotic Squad, M.P.D.C., was present when the above information was received.

Prior to and on January 17, 1964, Detectives David Paul and Thomas Didone, received information from a second previously reliable source who also related that it had been purchasing heroin from Esther McNair and Joseph Nelson in the vicinity of 8th and L Streets, N.W. This source also related that both McNair and Nelson were making several trips a day to northeast Washington and that when they returned to the area of 8th and L Streets, N.W., both would have fresh supplies of heroin. This source further related that it had obtained heroin from Joseph Nelson on January 16, 1964. This source further related that when McNair and Nelson went to pick

up fresh supplies of heroin they would travel in a 1960 Mercury automobile, blue in color, D.C. tags PL-993.

About 11:25 a.m., January 17, 1964, Detective Paul observed McNair and Nelson along with a third person, enter the above described auto parked in the vicinity of 8th and L St., N.W. Detective Paul followed this auto to the vicinity of 56th Street, N.E., and then observed McNair and Nelson walk to 301 56th Street, N.E., and observed both McNair and Nelson enter said premises. A short time later McNair and Nelson left the premises, observed by Detective Paul, who observed both walk back toward the above described auto.

Detective Paul then advised Detective Didone, by radio, of the movements of McNair and Nelson. Detective Didone then advised Detective Paul, by radio, that Detective Didone had the above described auto under observation and that these subjects were in the auto and that the auto was heading toward the northwest section of the city. Detective Didone advised Detective Paul, by radio, that he, Detective Didone, would follow the auto back.

Detective Paul then proceeded directly to the vicinity of 8th and L Streets, N.W., where along with other officers, Detective Paul took up observation points. About 12:44 p.m., January 17, 1964, Detective Paul observed the auto stop at the north side of the 700 block of L Street, N.W. Both McNair and Nelson started to leave the auto and at that time Detective Paul and the other officers proceeded to effect the arrest of Nelson and McNair. Nelson was charged with Harrison Narcotic Act violation and was found to be in possession of twenty-six decks of suspected heroin. At the same time McNair was also charged with violation of the Harrison Narcotic Act after which she attempted to dispose of a purse containing 26 decks of suspected heroin by throwing same to the ground.

Nelson advised Detectives Paul and Didone that he and McNair had just obtained their supply of heroin in northeast Washington, but would not reveal the location.

Investigation by Detective Paul reveals that McNair and Nelson have both been convicted of narcotic law violations; McNair is currently on bond for violation of the Harrison Narcotic Act, the arrest having been made by Detective Paul. Investigation also reveals that Nelson has given 301 56 St N.E., apt 31 as his address and that Esther Nelson has used that as her address. McNair has stated she is married to Nelson.

Det. Paul performed a preliminary field test on a portion of the seizure from Nelson and from McNair and obtained a positive color reaction from each test.

Because of the information received from the previously reliable sources along with the events outlined above which occurred on January 17, 1964, along with the previous narcotic involvement of both McNair and Nelson the undersigned does believe that there is now illicit narcotic drugs being secreted at 301 56th St., N.E., Apt. 301, by McNair and Nelson.

/s/ David Paul

Sworn to and subscribed to this 17 day of January, 1964.

Sam Wertleb, U.S. Commissioner

[Filed November 20, 1964]

APPENDIX B

[Caption omitted]

MEMORANDUM AND PRELIMINARY ORDER

The defendant was indicted for violation of the federal narcotics laws. His pretrial motions to dismiss the indictment and to suppress evidence were denied without opinion by another judge of the court. As the case came on for trial, the same motions were renewed. However, this Court reserved decision on the issues raised in said motions and the case was tried without a jury upon a waiver duly executed by the defendant and agreed to by the United States Attorney. Upon completion of the evidence, the Court found the defendant guilty as charged,[1] but withheld its judgment pending study and resolution of the legal points raised in defendant's motion for judgment of acquittal (the same points referred to above). The defendant does not assert the insufficiency of the evidence to sustain the finding of guilty. The motion for judgment of acquittal is based solely on the two legal points described herein.

In the first ground urged in his motion for judgment of acquittal, the defendant claims that the statutory scheme regulating narcotics activities operated to violate his constitutional rights. He points to 33 D.C. Code § 402 which defines certain narcotics activity as a misdemeanor and to 21 U.S.C. § 174 which proscribes allegedly identical conduct as a felony. The gist of his argument is that Congress may not constitutionally grant unlimited discretion

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[1]The two-count indictment charged violations of 26 U.S.C. § 4704(a) and 21 U.S.C. § 174. The indictment originally enumerated four counts. However, the defendant's motion for judgment of acquittal on the last two counts was granted on the ground that the indictment enlarged one transaction into two. The government agreed that there was only one seizure on one occasion and that only two counts were properly indictable.

to prosecute and convict for either a felony or a misdemeanor on the basis of the same act. This contention was recently urged in the Court of Appeals, but was implicitly rejected by the three-judge panel when they affirmed the conviction by per curiam order in *Lloyd v. United States*, No. 18049, D.C. Cir., July 3, 1964. It was again raised in a motion for rehearing *en banc* in the same case. That motion was denied by a divided court, *Lloyd v. United States*, supra, Nov. 6, 1964. However, Judge Bazelon's dissent from the denial posed a number of serious questions bearing on this argument. It has now come to the Court's attention that substantially the same issue has been raised again in the Court of Appeals in *Hutcherson v. United States*, No. 18375, D.C. Cir. That case has been argued and is presently under advisement. In anticipation of an express holding in *Hutcherson* which will be dispositive of this matter, the Court defers its ruling on the motion for judgment of acquittal based on this ground.

However, the Court does at this time address itself to the defendant's second ground for judgment of acquittal, namely, that the evidence was unlawfully seized and should be suppressed. The defendant contends that the warrant which authorized the search of the premises at 301 56th Street, N.E., Apt. 31, was supported by insufficient evidence to justify the Commissioner's finding of probable cause.

The search warrant for the above address was issued by the United States Commissioner on January 17, 1964, upon the affidavit of Detective David Paul of the Metropolitan Police Department's Narcotics Squad. Where, as here, the Commissioner's judgment on the sufficiency of probable cause for the issuance of a search warrant is based solely on an affidavit, the Court properly makes its own judgment on the same question, *Schoeneman v. United States*, 115 U.S. App. D.C. 110, 317 F.2d 173 (1963). The test to be applied is whether there was a "substantial basis" for the Commissioner to conclude that narcotics were in the premises authorized to be searched. *Rugen-*

dorf v. United States, 376 U.S. 528, 533 (1964); *Jones v. United States*, 362 U.S. 257, 271 (1960).

Although the meaning of "substantial basis" is not readily translatable into precise language, the Court is guided in its disposition of this issue by two relatively recent decisions of the Court of Appeals which applied that standard. In *Ward v. United States*, 108 U.S. App. D.C. 282, 281 F.2d 917 (1960), cert. denied, 365 U.S. 837 (1961), a search warrant was sustained where the application for its issuance recited (1) that the agent had observed known narcotic addicts and peddlers entering and leaving the premises on at least two occasions; (2) that one known peddler who departed from the premises that very day was arrested and found to be in possession of narcotics, which he admitted purchasing on the premises; and (3) "information from other reliable sources." Similarly, the issuance of a search warrant was upheld in *Irby v. United States*, 114 U.S. App. D.C. 246, 314 F.2d 251, cert. denied, 374 U.S. 842 (1963). In *Irby*, the affidavit supporting the warrant recited that narcotics officers observed one of their own special employees enter the premises in question for the purpose of making a purchase and then return shortly with the information that Mr. Irby, the occupant, was out "capping" heroin. The affidavit further stated that the agents observed several known addicts standing in front of the apartment premises. Later that day, it continued, the special employee was seen handing "police" money to another who returned with a small package of white powder believed to be narcotics. The affidavit also recited that some six weeks later the special employee again returned to the apartment in question and made a purchase of narcotics from a female therein. The Court held that this information was sufficient for the Commissioner to believe that Irby or others in his home were violating the law.

In the instant case, Detective David Paul's affidavit contained the following sworn statements, among others: It recited that Detective Paul had received information

from two previously reliable sources that McNair and Nelson were peddling heroin in the vicinity of 8th and L Streets, N.W. Both sources further stated they had made purchases on the day prior to the request for the warrant. They also stated they knew McNair and Nelson obtained new supplies several times a day; one source adding that they made several trips a day to northeast Washington in a certain, described automobile. The affidavit then recited that on January 17, the date the warrant was requested, Detective Paul observed McNair, Nelson and another enter the car described by the informant in the vicinity of 8th and L Streets, N.W., and that he followed the car to the vicinity of 56th Street, N.E. where he observed McNair and Nelson walk up to and enter the premises of 301 56th Street, N.E. After observing them leave the premises, Detective Paul stated that he radioed an associate to follow them while he returned directly to the vicinity of 8th and L Streets, N.W. It was further maintained in the affidavit that within a short time, McNair and Nelson returned to the vicinity of 8th and L Streets, N.W., where they were promptly arrested by Detective Paul and others who had taken up observation points. The affidavit stated that large quantities of a substance believed to be heroin were found on the persons of McNair and Nelson. Nelson told the detectives that the supply was obtained in northeast Washington, but he would not reveal the address. The affidavit then stated that an immediate investigation disclosed that both McNair and Nelson had prior narcotics convictions, and that Nelson had used 301 56th Street, N.E., Apt. 31, as his address.[2]

On the basis of this and other information in the affidavit, the warrant issued. The Court concludes that (1) the information from previously reliable sources that McNair and Nelson obtained several new supplies a day from northeast Washington; plus (2) the detective's per-

[2] Further, McNair said that she was married to Nelson.

sonal observation of McNair and Nelson drive to and enter the premises at 301 56th Street, N.E.; plus (3) the finding of a substance reasonably believed to be heroin on the persons of McNair and Nelson upon arrest shortly after they had departed from 301 56th Street, N.E.; plus (4) the fact that Nelson had previously given 301 56th Street, N.E., Apt. 31, as his address, all combined to give the commissioner a "substantial basis" for concluding that narcotics were probably in the premises in question. As the Supreme Court said in *Rugendorf*, supra at 533, "no more is required." Certainly the quantum of factors before the Commissioner in this case possessed the qualitative weight of the considerations held to be sufficient in *Ward* and *Irby*.

Therefore, the defendant's motion for judgment of acquittal based on illegally seized evidence is hereby denied. The motion for judgment of acquittal based on the first ground discussed herein is continued under advisement. The Court will issue a further and final order in this case upon receipt and consideration of the decision of the Court of Appeals in *Hutcherson*. In the meantime, the defendant may remain on bond.

/s/ Luther W. Youngdahl
Judge

November 20, 1964

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,557 September Term, 1965
Crim. No. 364-64

Earl S. Jennings,
Appellant,

v.

United States of America,
Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Mr. Justice Stanley F. Reed, retired,*
Danaher and Leventhal, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On appeal from his conviction on two counts of violations of the narcotics laws, this appellant having contended that an affidavit in support of an application for a search warrant was insufficient to justify the Commissioner in finding probable cause; and upon consideration of the record, the briefs and arguments of counsel, this court being satisfied that there is no error, *United States v. Ventresca*, 380 U.S. 102 (1965); *Rugendorf v. United States*, 376 U.S. 528 (1963); *Irby v. United States*, 114 U.S. App. D.C. 246, 314 F.2d 251, *cert. denied*, 374 U.S. 842 (1963); *United States v. Jennings*, 235 F. Supp. 551 (D.D.C. 1964),

It is ORDERED by the court that the judgment of the District Court appealed from in this cause is affirmed.

Per Curiam.

*Sitting by designation pursuant to 28 U.S.C. § 294(a).